ARBITRARY OFFICIAL DISCRETION. — Legislation which makes the right to pursue ordinary employments depend on the permission of administrative officers is usually held unconstitutional where it lays down no rules for the guidance of such officers and indicates no limits to their discretion. It is said that such legislation gives a power which may be used arbitrarily, and that this is depriving persons of the equal protection of the laws or of liberty or property without due process of law. *Yick Wo* v. *Hopkins*, 118 U. S. 356. If we grant the construction the conclusion seems unimpeachable. One unimportant decision may be *contra* on the facts, but no constitutional question appears to have been raised. *Roderick* v. *Whitson*, 51 Hun 620. It is possible that the retail liquor business, and perhaps others of a similar nature, form an exception to the general rule. *Crowley* v. *Christensen*, 137 U. S. 86. *Cf. Ex Parte Sing Lee*, 96 Cal. 354. In analogous cases that business has been held susceptible of different treatment from ordinary harmless occupations. *Schwuchow* v. *Chicago*, 68 Ill. 444. On the question of construction, however, there is authority for holding that no arbitrary discretion is intended, but only a reasonable discretion, the arbitrary exercise of which would be controlled by the courts in the ordinary way. *State* v. *Vopp*, 97 N. C. 477. This rule deserves to be applied oftener than it has been, although, of course, general rules have comparatively little force in matters of construction. There are intimations in some cases that the view in question is not permissible. See *City of Richmond* v. *Dudley*, 129 Ind. 112; *State* v. *Tenant*, 110 N. C. 609; *Baltimore* v. *Radecke*, 49 Md. 217; *Matter of Frazee*, 63 Mich. 396. But it is believed that these *dicta* cannot be supported. *Leader* v. *Moxom*, 2 W. Bl. 924. Unless, however, the ends to be aimed at in the exercise of discretion are pretty clearly determined by implication or expression and the choice of means is not very broad, the statute or ordinance may fall under the ban of another class of decisions in which the objection is; not that an arbitrary power is intended, but that the officer is expected to make rules to govern the activities of private persons, and that this is an unauthorized delegation of legislative power. *Matter of Frazee*, *supra*; *Chicago* v. *Trotter*, 136 Ill. 430. This seems to be valid, although the law on the subject is confused, and the applicability of the objection to acts of the legislature is doubtful. See 12 HARV. L. REV. 138.

A recent California case has slightly extended the rule of *Yick Wo* v. *Hopkins*, *supra*. A statute provided that where, in the work carried on in any factory, noxious gases were generated and were likely to be inhaled by the employees, and it should appear to a certain officer that this might be prevented by using some contrivance, he should order the same to be used, and a violation of his orders should constitute a misdemeanor. *Schaezlein* v. *Cabaniss*, 67 Pac. Rep. 755. Here it was not the right to carry on the business that depended on the consent of the officer, but merely the right to carry it on in a certain way. The court held that this made no difference, and that the statute was void. This seems to be correct, provided the interference of the officer might make the process of manufacture substantially more expensive or difficult. On the question of construction it is impossible to be dogmatic, and any short criticism would be unsatisfactory. It may be suggested, however, that the officer was apparently intended to extend his supervision to all factories of the class, that he would have little more than a question of fact to decide in each case, that, on a fair construction, he would not be

authorized to order anything which would make the business unremunerative, and that it would be difficult to secure the desired result by general legislation. The question has been discussed above as if it referred merely to the pursuit of ordinary trades or professions, but apparently ordinary methods of public demonstration and perhaps even ordinary recreations are similarly protected. See *Matter of Frazee*, *supra*; *Chicago* v. *Trotter*, *supra*; *State* v. *Yopp*, *supra*.

RIGHT OF TENANT TO REMOVE FIXTURES AFTER A NEW LEASE. — It is refreshing to find a restriction placed on the harsh doctrine that a tenant by accepting a lease for a new term without making an express reservation loses his right of removing fixtures. Ever since this doctrine was established by the case of *Loughran* v. *Ross*, 45 N. Y. 792, the New York courts have been trying to draw back from the unfortunate position then adopted. The principle of that case has received a decided limitation in a recent decision of the appellate division of the Supreme Court. *Bernheimer* v. *Adams*, 70 N. Y. App. Div. 114. The plaintiff foreclosed his mortgage on the lease and certain fixtures consisting of water-closets, partitions, etc., owned by a tenant. The latter's wife bought the property at the sale, took from the landlord a new lease for the unexpired term similar to the former one except that it ran to her as lessee, and remortgaged the fixtures and her new lease to the plaintiff in lieu of paying him the purchase price. This second mortgage was foreclosed and bought in by the plaintiff who subsequently replevied the fixtures. The court held that the right to remove the fixtures was not lost by the failure of plaintiff's mortgagor to reserve it upon surrendering the old lease.

The court evidently feeling the need of "cumulative" reasons for a decision so much at variance with the early New York doctrine, lays stress on the facts that the lessee was not the original tenant; that the lease was not for an additional term; and that the fixtures were not "distinctively realty." It is submitted that none of these considerations should affect the decision. That the lessee is a new tenant makes if anything a stronger case for the landlord, as it is conceivable that an assignee, taking a new lease in his own name, might not care to preserve the fixtures as such. Furthermore, it is less harsh to deny the right of removal to an assignee than to the original tenant. Nor does the fact that this was a change of tenancy for an unexpired term seem of great weight; for, after all, it was a new holding under a new lease without any reservation, the very crux of the question. It seems that one rule may be applied equally well to the case of a new tenant for the same term, and that of the same tenant for a new term, as both situations result from the surrender of an original tenancy. It might be argued that as the original tenant's right to remove fixtures continues at least until the end of the term, so his successor's also should exist up to that time. To this the reply is that it is a personal right, passing only by assignment, and has not in fact been assigned. The basis of the court's third distinction, that the fixtures in this case were not distinctively realty, is one somewhat favored in New York but of no standing elsewhere. *Smusch* v. *Kohn*, 22 N. Y. Misc. 344. One can hardly see how this distinction affects the point in issue. It probably is of value in determining whether a given chattel becomes a fixture or not; but granting it a fixture, the